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UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 744

Cases No. 847: EREN
No. 848: ROBERTSON
No. 849: SELLBERG
No. 850: THOMPSON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 21 March 1995, Suha Sirri Eren, Allen Boniface Robertson, Sven Urban Sellberg, and Joseph Paul Thompson, staff and former staff members of the United Nations, filed substantially identical applications (except for variations based on individual and personal circumstances), which requested the Tribunal:

"...

(i) To hold that the investigation of the Applicant[s] and [their] suspension ... was totally unwarranted as it was influenced by a complaint to the Secretary-General by a competing influential U.S. corporation (Evergreen Helicopters Inc.) which was determined to use, and did in fact use, considerable pressure to obtain ... United Nations ... contracts ...

(ii) To hold that the investigation of the Applicant[s] and the harsh measures of suspension inflicted on [them] were motivated by extraneous factors including media rumors of corruption in the United Nations, a U.S. proposal for the appointment of a U.N. Inspector-General and an alleged effort by the Secretary-General to show that these functions could be fulfilled by Mr. Mohamed Aly Niazi, a retired staff member who was ... reappointed by the Secretary-General at ... the

ASG [Assistant Secretary-General] level 'for inspections and investigations' shortly after the suspension of the Applicant[s] ...

(iii) To hold that the suspension of the Applicant[s] was totally arbitrary and was not based on valid evidence of corruption but ... the unreasonable premise of conspiracy and collusion between [each of] the Applicant[s] and seven other staff members of different ranks, different backgrounds, different contractual status and different official functions and responsibilities.

(iv) To hold that the harsh and unreasonable measures accompanying the implementation of the suspension were totally unjustified and have led to irreparable damage to the personal and professional image and reputation of the Applicant[s].

(v) To hold that the suspension ordered in this case was not based on any evidence that the charges of misconduct were well founded in terms of paragraph 3 of Administrative Instruction ST/AI/371 (...). Furthermore there was nothing in the preliminary investigation to indicate, as stipulated in paragraph 4 of the Administrative Instruction, that the conduct of the Applicant[s] might pose a danger to other staff members or to the Organization, or that it posed a risk of evidence being destroyed or concealed ...

(vi) To hold that even if one could find justification for the initial suspension on 9 July 1993, the continuation of the suspension ... [was] totally arbitrary and betrayed the heavy role of the extraneous factors which led to the initial investigation and suspension.

(vii) To hold that [the continued denial to the Applicant Eren of his confiscated retiree ground pass, and the continued suspension of Applicants Robertson, Sellberg and Thompson] ... [were] ... arbitrary, capricious, callous and vindictive, ... [and] amounted to harsh and cruel punishment, ... not motivated by the best interest of the United Nations.

(viii) To hold that the total and unequivocal exoneration of the Applicant[s] by the Ad Hoc Joint Disciplinary Committee should have been treated more seriously by the Secretary-General and should have formed the basis for his decision.

(ix) To hold that paragraph 4 of Mr. Connor's [Under-Secretary-General for Administration and Management] letter to the Applicant[s] dated 21 December 1994 (...) reflects a serious error in his interpretation of the findings of the Ad

Hoc Joint Disciplinary Committee, as there was no mention in the Committee's findings of 'unsatisfactory conduct.' In fact every quotation [from the findings] ... excludes the possibility of misconduct.

(x) To hold that the Secretary-General has erred in conceiving his broad discretion with regard to disciplinary matters and the appropriate disciplinary action, as an unchallengeable authority to disregard the findings of fact by the [Joint] Disciplinary Committee and its conclusions that no act of misconduct was committed by the staff member[s] concerned.

(xi) To hold that the Secretary-General's decision is vitiated by a serious mistake of law in that the disciplinary measures were imposed for alleged errors pertaining to the Applicant[s]' performance and not conduct, bearing in mind that under staff rule 110.3(b)(1) performance falls within the competence of supervisory officials and is not subject to disciplinary measures."

Additionally, the Applicant Eren requested the Tribunal:

"(xii) To order a rescission of the Secretary-General's decision conveyed to the Applicant in Mr. Connor's letter dated 21 December 1994. (...).

(xiii) Alternatively and should the Secretary-General decide not to accede to the Tribunal's decision, the Applicant prays that adequate compensation be ordered in his favour, bearing in mind the grave moral and material injury sustained by the Applicant and the negative effect this already had and will inevitably have on his hitherto unimpaired image and on future career prospects.

(xiv) To take into account, in determining the amounts of compensation, that in the course of the proceedings including trumped up investigation, the unwarranted suspension and all the consequential aggravation, the Applicant had to undergo an emergency open heart surgery in January 1994, which resulted in 14 days of hospitalization and two months of convalescence.

(xv) The Applicant also prays that the Tribunal order compensation to the Applicant for unusual heavy expenditure incurred by him in the preparation of his responses to the Director of Personnel and to the Ad Hoc Joint Disciplinary Committee which included Federal Express mailings, frequent

lengthy long distance telephone calls and volumes of facsimiles exchanged between him in New York and his counsel in Florida, for six months, from December 1993 to June 1994 and from December 1994 to the presentation of this application. This is assessed at a minimum of $1,000.00."

Additionally, the Applicant Robertson requested the Tribunal:

"(xiii) To order a rescission of the Secretary-General's decision conveyed to the Applicant in Mr. Connor's letter dated 21 December 1994, (...) and the measures stipulated therein, and to order the reinstatement of the Applicant to his previous post as Chief, Purchase and Transportation Service or the replacement post for this function.

(xiv) To hold that but for the suspension and the disciplinary actions, the Applicant would have been a legitimate candidate for promotion to the D-2 level on two occasions.

(xv) Alternatively, and should the Secretary-General decide not to accede to the Tribunal's decision, the Applicant prays that adequate compensation be ordered in his favour, bearing in mind the grave moral, psychological and material injury sustained by the Applicant and his family and the negative effect this will have on his future career in the United Nations.

(xvi) To consider that the circumstances of this case, including the insensitive, harsh and inhuman manner in which the Applicant was treated and unjustly deprived of promotion on two occasions, constitute sufficient justification for ordering the payment of a higher compensation than the standard compensation stipulated in Article 9 of the Statute of the Administrative Tribunal.

(xvii) The Applicant also prays that the Tribunal order compensation to the Applicant for unusual heavy expenditure incurred by him in the preparation of his responses to the Director of Personnel and to the Ad Hoc Joint Disciplinary Committee prior to this presentation which included legal fees amounting to $6,188 charged by ... [the] Applicant's first Counsel and parking fees of at least $500 as he had to use commercial parking near the UN after he was denied parking at the UN; and also other expenses including long distance telephone calls and express mail in the preparation of this presentation which are assessed at approximately $150.00."

Additionally, on behalf of the Applicant Sellberg, who died on 17 September 1995, the Tribunal was requested:

"(xiii) To declare that the Secretary-General's decision conveyed to the Applicant in Mr. Connor's letter dated 21 December 1994 (...) and the disciplinary measures stipulated therein were totally unwarranted and were contrary to the findings and conclusions of the Ad Hoc Joint Disciplinary Committee, and in fact contrary to the weight of written and oral evidence tendered to the aforesaid Committee, which findings and conclusions were not contested by the Secretary-General.

(xiv) Since the request for reinstatement of the Applicant to his previous post has been superseded by his tragic demise which has foreclosed the possibility of implementation, to order the payment to his widow Mrs. J. Sellberg compensation, bearing in mind the severe emotional stress which was inflicted on the late Mr. Sellberg throughout 18 months of unwarranted suspension, investigation, public and private humiliation followed by arbitrary, capricious, vindictive and undeserved punishment.

(xv) To consider that the circumstances of this case, including the insensitive, harsh and inhuman manner in which the Applicant was treated, including the imposition of disciplinary measures consisting of a written censure, a four steps-in-grade reduction and a two year deferment of eligibility for within-grade-increment constitute sufficient grounds for ordering the payment of five years' net salary to compensate for the loss of terminal pay payable to his wife because of his reduced salary and his demise before reaching the age of 55.

(xvi) The Applicant also prays that the Tribunal order compensation to the Applicant for unusual heavy expenditure incurred by him in the preparation of his responses to the Director of Personnel and to the Ad Hoc Joint Disciplinary Committee which included Federal Express mailings, frequent lengthy long distance telephone calls and volumes of facsimiles exchanged between him in New York and his counsel in Florida for six months from December 1993 to June 1994 and from December 1994 to the presentation of this application. This is assessed at a minimum of $1,000.00."

Additionally, the Applicant Thompson requested the Tribunal:

"(xiii) To order a rescission of the Secretary-General's decision conveyed to the Applicant in Mr. Connor's letter dated 21 December 1994 (...) and to order the Applicant's reinstatement within the Organization to his previous post as the Officer-in-Charge of the Logistics and Communications Section or a post with similar responsibilities, based on his expectation of career employment (...).

(xiv) Alternatively and should the Secretary-General decide not to accede to the Tribunal's decision, the Applicant prays that adequate compensation be ordered in his favour, bearing in mind the grave moral and material injury sustained by him and the negative effect this will have on any future employment prospects.

(xv) To consider that the circumstances of this case, including the insensitive harsh and inhuman manner in which the Applicant was treated, constitute sufficient justification for ordering the payment of a higher compensation than the standard compensation stipulated in Article 9 of the Statute of the Administrative Tribunal (...).

(xvi) To take into account in determining the amount of compensation that, at the time of suspension, the Applicant had an approved Special Post Allowance to the P-5 level which he had every reason to assume would have continued at least until the expiration of his fixed-term appointment on 30 September 1994. The authorization of the allowance was discontinued with effect from the date of suspension, i.e. 9 July 1993. The Applicant estimates the difference in salary to amount to $15,000.

(xvii) The Applicant also prays that the Tribunal order compensation to the Applicant for unusually heavy expenditure incurred by him in the preparation of his responses to the Director of Personnel and to the Ad Hoc Joint Disciplinary Committee which included Federal Express mailings, frequent lengthy long distance telephone calls and volumes of facsimiles exchanged between him in New York and his counsel in Florida for six months from December 1993 to June 1994 and from December 1994 to the presentation of this application. This is assessed at a minimum of $1,000.00."

Whereas, on 25 March and again on 27 May 1995, the Applicants requested expedited consideration of their applications;

Whereas, on 8 June 1995, the Respondent submitted observations on the Applicants' request for expedited consideration of their applications;

Whereas, on 2 August 1995, the President of the Tribunal ruled that the applications would not be considered by the Tribunal on an expedited basis;

Whereas the Respondent filed his answer on 8 September 1995;

Whereas, on 18 September 1995, the Applicants submitted a new request for expedited consideration of their applications, and on 25 September 1995, the Respondent submitted his observations thereon;

Whereas, on 21 September 1995, the Applicant Sellberg's pleas were amended;

Whereas, on 26 September 1995, the President of the Tribunal decided that the applications would be considered on an expedited basis;

Whereas the Applicants filed written observations on 23 October 1995;

Whereas, on 30 October 1995, the Respondent submitted comments on the Applicants' observations, and on 2 November 1995, the Applicants submitted comments thereon;

Whereas, on 2 November 1995, the Tribunal put a question to the Respondent, to which he replied on 6 November 1995 and submitted a document;

Whereas, on 7 November 1995, the Applicant provided observations on the document submitted by the Respondent;

Whereas the facts in the case are as follows:

The Applicant Eren, a national of the United States of America, entered the service of the United Nations on 16 November

1972, as a Contracts Officer at the P-4 level in the Purchase and Transportation Service (PTS) of the Office of General Services (OGS), on a probationary appointment. On 1 November 1974, he was granted a permanent appointment. On 1 April 1979, he was promoted to the P-5 level as Chief of Section, Technical Cooperation Contracts Unit, Technical Cooperation for Development (TCD). He reached retirement age in October 1986, but his appointment was extended through 31 December 1986, when he separated from the Organization. Thereafter, the Applicant continued to serve, initially as a consultant, and from 1 March 1989, as a staff member at the P-4 level, on seven short-term appointments, as a Procurement Officer. From 1 April through 29 September 1993, he served on a short-term appointment as Procurement Officer, Field Missions Procurement Section (FMPS), Commercial, Purchase and Transportation Service (CPTS), OGS. On 9 July 1993, the Applicant was suspended with full pay. On 29 September 1993, he separated from the Organization upon the expiration of his appointment.

The Applicant Robertson, a national of Zambia, entered the service of the United Nations on 1 January 1967, on a two year fixed-term appointment as a Professional Trainee at the P-1 level, in the Executive Office of OGS. On 1 January 1969, he was transferred to PTS, as a Procurement Officer. On 1 June 1969, the Applicant was promoted to the P-2 level as a Contracts Officer. On 1 January 1970, he was granted a probationary appointment, which became permanent on 1 October 1970. On 1 April 1972, he was promoted to the P-3 level. On 1 April 1975, he was promoted to the P-4 level, as Chief of the United Nations Emergency Force Procurement Unit. On 1 April 1980, the Applicant was promoted to the P-5 level, as Acting Chief, FMPS. On 19 May 1980, he was transferred to Commercial Management Service (CMS), as Deputy Chief.

On 3 August 1982, he was appointed Chief of CMS. On 1 April 1983, he was promoted to the D-1 level. Following the merger of CMS and PTS, with effect from 13 April 1988, the Applicant was appointed Chief of CPTS. On 9 July 1993, the Applicant was suspended with full pay. His suspension was lifted, with effect from 23 January 1995. He was assigned to work on a special project in the Office of the Director, Buildings and Commercial Services Division.

The Applicant Sellberg, a national of Sweden, entered the service of the United Nations on 1 May 1977, on a one year fixed-term appointment at the P-3 level, as a Contracts Officer for the United Nations Emergency Force (UNEF) in Egypt. On 6 December 1978, he was transferred to the United Nations Interim Force in Lebanon (UNIFIL), where he served as a Contracts Officer. On 19 December 1980, he was transferred to Headquarters and assigned to PTS, as a Procurement Officer. On 14 September 1981, the Applicant was re-assigned to FMPS, PTS. On 1 April 1982, he was promoted to the P-4 level. On 1 September 1982, he was granted a probationary appointment which became permanent on 1 June 1983. On 1 February 1988, the Applicant was promoted to the P-5 level, as Chief of FMPS. On 9 July 1993, the Applicant was suspended with full pay. His suspension was lifted, with effect from 21 February 1995. He was assigned to the Co-ordinator for Overseas Property Management and Construction Unit, Building and Commercial Services Division. The Applicant died on 17 September 1995, while in service, as a result of a heart attack.

The Applicant Thompson, a Major in the Canadian Armed Forces, entered the service of the United Nations, on secondment from the Canadian Government, on 2 September 1991, on a one year fixed-term appointment, as a Staff Officer at the P-4 level in the Field Operations Division (FOD). On 22 March 1992, he was appointed Chief

of the Logistics Unit, Logistics and Communications Section (LCS). On 18 May 1992, he was appointed Officer-in-Charge, LCS, and with effect from 18 August 1992, he was granted a Special Post Allowance at the P-5 level. From 2 September 1992 through 30 April 1993, his appointment was extended several times for periods ranging from one to four months. On 1 May 1993, it was extended for a further period of eleven months. On 9 July 1993, the Applicant was suspended with full pay. His appointment was extended for an additional period of three months, and his suspension was lifted, with effect from 22 March 1994. Following several additional extensions, on 30 September 1994, he separated from the Organization upon the expiration of his appointment.

On 13 May 1993, the President of Evergreen Helicopters, Inc., a U.S. corporation, wrote to the Chairman of the United States House of Representatives Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, expressing his concern at "irregularities in the procurement of UNTAC [United Nations Transitional Authority in Cambodia] Helicopter Contracts." He claimed that because of these irregularities, the contracts "went principally to one Canadian helicopter broker", although Evergreen "was the low bidder".

In a letter to the Secretary-General, dated 14 May 1993, copied to the United States Permanent Representative to the UN and to the Under-Secretary-General for Administration and Management, the President of Evergreen Helicopters conveyed the same concern. He alleged that through a "secret process, a company named Skylink ... has been able to obtain a virtual monopoly on UN procurement." He further stated "Evergreen has strong evidence that it should have been awarded other contracts which were diverted unfairly to Skylink." He requested agreement "that no single vendor should be allowed a monopoly in a secret process."

A preliminary investigation was undertaken, resulting in a report, dated June 1993, entitled "Review of Contracts Awarded to Skylink". The report concluded that "[p]ractically all of the fifty-two cases reviewed showed non-compliance with established procurement procedures."

On 9 July 1993, the Acting Director of Personnel transmitted to each of the Applicants a copy of "confidential analyses ... conveying that you were instrumental in the improper award of [a] UN contract[s] for air transportation services to a favoured contractor, Skylink." She requested "any written statement or explanation you may wish to make" within two weeks, and advised the Applicants that they were suspended from duty with full pay, in accordance with staff rule 110.2, effective immediately and for "a probable duration of three months." According to the record, the Applicants were escorted out of the Secretariat building and their ground passes were taken from them.

In a letter to the Acting Director of Personnel, dated 14 July 1993, Counsel for the Applicants protested their suspension and requested that it be rescinded. Alternatively, he requested an extension of two weeks to prepare their response to the allegations, noting the difficulties of gaining access to the premises and to relevant documentation. In letters to the Secretary-General, dated 19 August 1993, and 12 August 1993 in the case of the Applicant Robertson, the Applicants requested review of the administrative decision to suspend them from service.

On 8 September 1993, the Applicants Eren, Sellberg and Thompson lodged an appeal with the Joint Appeals Board (JAB). They requested suspension of action on the decision to suspend them, arguing that the decision was "totally unjustified and in violation of the provisions of administrative instruction ST/AI/371". On 22 September 1993, the JAB adopted its report. Its conclusions and recommendations read, inter alia, as follows:

"...

12. [The Panel] ... noted that the Staff Rules provide that suspension from duty is not a disciplinary measure but an administrative act. The Panel also noted that the suspension in this case was with full pay. Bearing this in mind, ..., the Panel considered that it had not been shown that implementation of the decision in question would cause irreparable injury to the Appellants.

13. In light of the foregoing, the Panel felt that it had no alternative but to recommend to the Secretary-General that the request for suspension of action not be granted.

* * * * *

14. The Panel found it necessary, however, to bring to the attention of the Secretary-General that, ..., the danger the Appellants pose to the investigation, if they were to return to their offices or to other duties within the UN, would - in the opinion of the Panel - be remote. Furthermore, the Panel felt that although no irreparable injury has yet been shown, an extension of the suspension beyond the three-month period, effective 9 July 1993, was likely to do so. Therefore, the Panel recommends that no such extension take place."

On 6 October 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicants Eren, Sellberg and Thompson and informed them that the Secretary-General had decided "to accept the Board's recommendation that the request for suspension of action not be granted." On the same date, the Director of Personnel informed the Applicants Sellberg and Thompson that their suspension with pay had been extended for a further period of two months. On 12 October 1993, the Applicants Sellberg and Thompson lodged another appeal to the JAB, requesting "the suspension of the order of suspension." On 23 October 1993, the JAB adopted its report. Its conclusions and recommendations read, inter alia, as follows:

"Conclusions and Recommendations

14. The Panel decided that it was not necessary to review the charges which the Respondent had offered to submit to it and that, therefore, there was no need for any additional material to be submitted by the parties.

15. The Panel had first to determine whether the request for suspension of action was receivable. The Panel noted that to entertain a suspension of action, it was necessary to show first, that the action to be suspended had not yet been carried out and second, if it were carried out, that irreparable harm would be done to the Appellants.

16. The Panel noted that the Appellants were suspended from duty in July 1993 and that, on 6 October, their suspension was extended for a further period of two months. The Panel concluded that the suspension from duty of the Appellants had been implemented from the date it was effective and it considered the suspension from duty as 'fait accompli'.

17. It also noted that the suspension in this case was with full pay. Bearing this in mind, and taking into account the statements of the Appellants and their Counsel, the Panel considered that it had not been shown that implementation of the decision in question would cause irreparable injury to the Appellants.

18. In light of the foregoing, the Panel decided to recommend to the Secretary-General that the request for suspension of action not be granted.

* * * * *

19. The Panel found it necessary, however, to bring to the attention of the Secretary-General that, while it understood the need for a thorough examination of all the facts leading to the suspension from duty, it was concerned at the length of the investigation and its effect on the Appellants and that it could continue indefinitely. The Panel felt that such a course of conduct would invite the continuation of rumours and speculation, which would not be in the best interest of either the Appellants or the Administration."

On 4 November 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicants Sellberg and Thompson. He informed them that the

Secretary-General had decided "not to grant your request for suspension of action."

In the meantime, in letters dated 11, 6, 12, and 13 August 1993, respectively, the Applicants Eren, Robertson, Sellberg and Thompson responded to the allegations made against them. An additional allegation of misconduct was made against the Applicant Sellberg on 2 September 1993, to which he responded on 16 September 1993. Additional allegations of misconduct were made against all the Applicants on 27 September 1993. The Applicant Eren responded on 6 October 1993, and the other Applicants responded on 8 October 1993. Further allegations of misconduct were levelled against the Applicants Eren, Robertson and Thompson on 15 October 1993. The Applicant Eren responded to them on 22 October 1993, and the Applicants Robertson and Thompson responded to them on 21 October 1993.

In a letter dated 1 October 1993, the Director of Personnel, OHRM, advised the Applicant Eren that as his short-term appointment had expired on 29 September 1993, he was no longer subject to the Secretary-General's disciplinary authority, and the case could be closed as a result of his separation. However, the Applicant could, if he so wished, continue as a party to the investigation proceedings concerning the allegations of misconduct. In a reply dated 8 October 1993, the Applicant Eren advised the Director of Personnel, "I have no intention of walking away from the investigation which resulted in my suspension from duty ...". He stated that he wished to remain a party to the proceedings.

In a letter dated 17 November 1993, the Director of Personnel informed each of the Applicants, "[w]hile your comments on a certain number of the allegations made against you were found to be acceptable, a number of points remain without satisfactory explanation". She advised them that the matter would be referred to an ad hoc Joint Disciplinary Committee (JDC). She further informed

the Applicants Robertson and Sellberg that their suspension from duty with pay would remain in effect "until further notification."

On 14 December 1993 and on 5 January 1994, the Director of Personnel informed the Applicants Sellberg and Eren, respectively, that their cases had been referred to the JDC and advised them of the charges against them, as follows:

> "A. You engaged in a pattern of unequal treatment of vendors of air transportation services which resulted in the unjustified selection of one preferred vendor, Skylink, over other vendors, thus breaching a basic principle of the procurement process which requires that equal treatment be given to all potential contractors, and that
>
> B. You repeatedly misinformed or provided incomplete information to the Headquarters Committee on Contracts with a view to inducing that Committee to recommend the award of contracts to one preferred vendor, Skylink."

On 7 January 1994, the Director of Personnel informed the Applicant Robertson that his case had been referred to the JDC and advised him of the charges against him, as follows:

> "a. [You] took direct action to favour a particular vendor, Skylink, and were grossly negligent in the performance of your duties as Chief, Commercial, Purchase and Transportation Service, in failing to discharge your supervisory duties and in failing to direct the operations of your Service in such a way as to prevent improper procurement practices from being pursued. Your failure allowed the development of a pattern of unequal treatment among vendors of air transportation services where Skylink was repeatedly treated more favourably than other vendors, thus breaching a basic principle of the procurement process which requires that equal treatment be given to all potential contractors;
>
> b. [You] submitted to the Headquarters Committee on Contracts, on numerous occasions, incomplete and incorrect information which led that Committee into recommending the award of contracts to a preferred vendor, Skylink;
>
> c. [You] concealed relevant information from a superior officer, in violation of the Standards of Conduct."

On 2 February 1994, the Director of Personnel informed the Applicant Thompson that his case had been referred to the JDC and advised him of the charges against him, as follows:

> "a. In giving expert advice in connection with the requisition of air transportation services and the evaluation of proposals, you engaged in a pattern of unequal treatment of vendors of air transportation services to the UN which resulted in the unjustified selection of one preferred vendor, Skylink, over other vendors, thus breaching a basic principle of the entire procurement process which requires that equal treatment be given to all potential contractors; and that
>
> b. You repeatedly misinformed the Headquarters Committee on Contracts or, in the evaluations presented to the Headquarters Committee on Contracts, for which you were responsible, misrepresented the facts in a manner that was unduly favourable to one preferred vendor, Skylink, thus inducing that Committee to recommend the award of contracts to that vendor."

On 14 April 1994, the Applicant Robertson petitioned the Under-Secretary-General for Administration and Management to authorize him to "resume his functions", noting that "the evidence since [his suspension] has shown that there is no case for disciplinary action as such." In a reply dated 22 April 1994, the Under-Secretary-General took issue with this assertion. He advised the Applicant that, following his suspension, an "Inter-Departmental Working Group was convened to review the findings that led to the suspension." In a November 1993 report to the Under-Secretary-General, this group had "recommended summary dismissal in a number of cases and that one case be referred to the Joint Disciplinary Committee (JDC) or considered for separation for unsatisfactory services." The Administration had decided to refer the cases to the JDC rather than recommending summary dismissal "in order to be scrupulously fair and to fully respect due process."

The JDC adopted and submitted its reports to the Secretary-General on 21 September 1994. The reports reviewed the various contracts to which the allegations of misconduct related in the case of each Applicant and made the following findings with respect to each contract (As there is substantial overlap in the particular contracts considered in each case, and the JDC findings with respect to each contract and each Applicant, the JDC reports have been consolidated for inclusion in this judgement. Findings pertaining to fewer than all of the Applicants refer by name to the individual(s) concerned. Square brackets denote the consolidation of slight variations in texts, or texts which only appear in certain JDC reports, as indicated by name references):

"B. Findings With Respect To Each Contract

1. Contract No. 17/92

1. The Panel finds no evidence of unequal treatment of vendors or an intent to favor Skylink on the part of [the Applicants Eren, Robertson and Sellberg] in connection with Contract No. 17/92. Instead, the evidence demonstrates that the Processing Unit set the RFP [Request for Proposal] deadline at 2:00 p.m. on 6 February 1992, that all proposals submitted were transmitted by the Processing Unit for consideration by FMPS, and that Skylink's proposal was timely. [Consequently, the Panel finds the charges that the Applicant Robertson failed in his supervisory responsibilities, or failed to disclose the full factual background with regard to Contract No. 17/92 to the HCC, are unfounded.]

2. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Eren, Robertson and Sellberg] in connection with Contract No. 17/92.

2. Contract No. 23/92

[3.] The Panel finds no evidence [of unequal treatment of vendors or an intent to favor Skylink on the part of the Applicants Eren, Sellberg and Thompson, or of inadequate supervision of his staff or misleading presentations to the HCC on the part of the Applicant Robertson] in connection with the original Contract No. 23/92 and the three subsequent amendments.

a. The Panel finds no evidence of an intent [by the Applicants Eren, Sellberg and Thompson to favor or benefit Skylink, or by the Applicant Robertson to mislead the HCC with respect to] the award of the three amendments under Contract No. 23/92. The Panel finds that this contract and the amendments were for urgent, large-scale movements of personnel from a number of countries, involving volatile and ever-changing requirements -- the cities and countries, the numbers of personnel to be moved and the timing of the movements constantly changed. The Panel finds that such circumstances necessarily had an impact on the procurement process and made it difficult to establish a firm price structure in advance. The Panel finds that the lump sum amount in the original offer and the lack of detail in the original contract made it difficult to ascertain the basis upon which such amount was calculated and, therefore, created confusion when comparisons were made between the prices under the original contract and the prices in the amendments. The Panel finds, however, that Skylink was the lowest proposer vis-à-vis competitors who offered either incomplete proposals or noncompetitive prices in connection with the original contract. The evidence demonstrates that Skylink stayed with the same or comparable fare structure in the amendments. The evidence further demonstrates that, in view of the urgent nature of these personnel movements and of the fact that Skylink had recently been the lowest proposer, the award of amendments to Skylink without issuing RFPs did not represent unequal treatment in favor of Skylink. The Panel finds that, in response to the RFP issued in June 1992 for movement of additional personnel to Phnom Penh, Skylink again was the lowest acceptable proposer and was awarded Contract No. 132/92, a contract not part of this disciplinary proceeding.

b. The Panel finds that Skylink's proposal was received by the Processing Unit prior to the 11:00 a.m. deadline and, therefore, was timely.

4. While the Panel finds that the information provided to the HCC was perfunctory in that it did not reflect the complexities and variables in the original contract and the amendments, the Panel finds no evidence of an intent to misinform or [provide incomplete information to the HCC for the benefit of Skylink on the part of the Applicants Eren, Robertson, or Sellberg, or misrepresent the facts to the HCC in order to favor Skylink on the part of the Applicant Thompson] in connection with the original contract or the three amendments.

5. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Eren, Robertson, Sellberg and Thompson] in connection with Contract No. 23/92.

3. Contract No. 54/92

6. The Panel finds no evidence of [unequal treatment of vendors or an intent to favor Skylink by the Applicants Eren and Sellberg, or of conduct condoning unequal treatment by vendors or an intent to favour Skylink by the Applicant Robertson] in connection with Contract No. 54/92.

a. The Panel finds no evidence of unequal treatment of vendors or an intent to favour Skylink in connection with the treatment of Aircontact's proposal. Rather, the Panel finds that it was reasonable to interpret Aircontact's proposal as not including cargo insurance and, therefore, to recommend award of the contract to Skylink as the lowest acceptable proposer. While it might have been appropriate to contact Aircontact to clarify the wording of its proposal, given the time pressure and the fact that no insurance other than cargo insurance was mentioned in the RFP, the Panel finds no evidence that the failure to contact Aircontact was an effort to favor Skylink or to exclude Aircontact.

b. The Panel finds that Skylink's proposal was received prior to the 11:00 a.m. deadline on 10 April 1992 and, therefore, was timely. The evidence demonstrates that Skylink's proposal was stamped "received" in FMPS that day at 10:47 a.m. and was evaluated and approved by the HCC that afternoon.

[7.] The Panel finds no evidence that [the Applicant Thompson] misused his expertise in order to favor Skylink or influence the process leading to the award to Skylink of Contract No. 54/92. The Panel finds that it was reasonable to interpret Aircontact's proposal as not including cargo insurance and, therefore, to recommend award of the contract to Skylink as the lowest acceptable proposer.

[8.] The Panel finds no evidence that [the Applicant Thompson] misinformed the HCC, or misrepresented the facts in the FOD evaluations presented to the HCC, in order to favor Skylink in connection with Contract No. 54/92.

9. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Eren, Robertson, Sellberg and Thompson] in connection with Contract No. 54/92.

4. Contract Nos. 62/92 and 111/92

10. The Panel finds no evidence [of unequal treatment of vendors or an intent to favor Skylink on the part of the Applicants Eren and Sellberg, or of conduct condoning unequal treatment of vendors or an intent to favor Skylink on the part of the Applicant Robertson, or that the Applicant Thompson misused his expertise to favour Skylink over other vendors] in connection with the original Contract Nos. 62/92 and 111/92 and the subsequent extensions and amendment.

a. The Panel finds no evidence of unequal treatment of vendors or an intent to favor Skylink in connection with the treatment of Evergreen's proposal. The evidence demonstrates that, despite requirements specified in the RFP, which included a positioning date of 15 May, Evergreen's proposal contained no positioning date and included language implying that it could not meet the RFP requirements and suggesting that the United Nations assume the burden of meeting such requirements. While it might have been appropriate for [the Applicant Eren to have contacted] Evergreen to clarify the wording of its proposal, the Panel finds no evidence that the failure to contact Evergreen was motivated by an effort to favor Skylink or to exclude Evergreen.

b. The Panel finds no evidence of unequal treatment of vendors or an intent to favor Skylink in connection with [the Applicant Eren's decision to contact Skylink regarding the missing information on the positioning date for the MI-17 helicopters in its proposal, or Captain Pieringer's decision to contact Skylink regarding the operational mobilization of the MI-17 helicopters in its proposal]. The evidence demonstrates that Skylink's proposal for the MI-17 helicopters included a firm commitment to meet the positioning date (Box SKI-5). The Panel [further] finds that [the Applicant Eren] acted properly in alerting Skylink to the clerical omission of Box SKI-20, "Date of Positioning", from its proposal for the MI-17 helicopters, which information had been included in Skylink's proposal with respect to the MI-26 helicopters.

c. The Panel finds no evidence of unequal treatment or an intent to favor Skylink in permitting Skylink to add Box SKI-20 to the MI-17 portion of its proposal and in utilizing such information in the evaluation of the proposals. The Panel finds that Skylink had already committed itself in a timely manner to meeting the positioning date in Box SKI-5 of its MI-17 proposal.

d. The Panel finds no evidence of unequal treatment or an intent to favor or benefit Skylink through the splitting of the award into what became Contract Nos. 62/92 and 111/92, and the subsequent extensions. The Administration's allegations are premised on the basis that Aeroflot was the lowest acceptable proposer. The evidence demonstrates, however, that Aeroflot could not deliver the MI-17 helicopters on time (i.e., 15 May 1992) and thus could not have been the lowest acceptable proposer for award of the MI-17 and MI-26 helicopters as a package. The Panel finds that Skylink was the lowest acceptable proposer for the MI-17 and MI-26 helicopters as a package. The decision to split the award - initially between Skylink and Aeroflot and ultimately between Skylink and Aerolift - thus deprived Skylink of receiving the entire award and represented savings to the United Nations.

11. The Panel finds no evidence of an intent ... to misinform or provide incomplete information to the HCC for the benefit of Skylink in connection with Contract Nos. 62/92 and 111/92.

a. The Panel finds that the [initial presentation to the HCC] was inaccurate in that it disqualified Aeroflot on the basis of cost rather than on Aeroflot's inability to meet the positioning date required. The Panel finds, however, no evidence of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink with respect to Aeroflot's proposal or Aeroflot's willingness to accept the split award. As discussed above, the Panel has found that Aeroflot was not the lowest acceptable overall proposer, and had no entitlement to the overall award.

b. The Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC with respect to Evergreen's proposal.

c. The Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC with respect to Skylink's proposal.

d. With respect to the amendment for the two additional MI-17 helicopters on stand-by, the Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink. The Panel finds, however, that the presentation to the HCC was factually incomplete in that it failed to make the HCC aware that the Lease Agreement had previously made reference to such helicopters. Moreover, the Panel finds that the Lease Agreement was poorly drafted and seemed to imply that the 2 stand-by

helicopters would be provided at no charge at all, contrary to Skylink's proposal which offered to provide the stand-by helicopters free in terms of block hours only (Box SKI-10), i.e., not free in terms of positioning and depositioning (Box SKI-5) and painting/repainting (Box SKI-11) costs. The corrective action taken by FMPS was thus appropriate.

12. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Eren, Robertson, Sellberg and Thompson] in connection with Contract Nos. 62/92 and 111/92.

5. Contract No. 113/92

13. The Panel finds no evidence [of condoning the unequal treatment of vendors or favoritism toward Skylink on the part of the Applicant Robertson, of unequal treatment of vendors or an intent to favor Skylink on the part of the Applicant Sellberg, or of unequal treatment of vendors, of an intent to favor Skylink, or of an intent to influence subordinates in favor of Skylink on the part of the Applicant Thompson] in connection with Contract No. 113/92 and the amendment thereto.

a. The Panel finds no evidence of unequal treatment or an intent to favor Skylink in connection with the treatment of the Aircontact and Skylink proposals. While it might have been appropriate to have contacted Aircontact for purposes of clarification, the Panel finds that the analysis of Aircontact's proposal by FMPS and [the Applicant Thompson's staff in] FOD was reasonable.

b. The Panel finds no evidence (i) that the amendment of Contract No. 113/92, involving two flights stopping in Kuwait City to combine the movement of Tunisian personnel and cargo with the transport of UNIKOM vehicles needed by UNTAC, was inappropriate or (ii) that the intent of the amendment was to favor Skylink. The evidence demonstrates that the two flights, in fact, went to Kuwait City.

c. The Panel finds no evidence of unequal treatment or an intent to favor Skylink in the decision not to split Contract No. 113/92 between passenger lift and cargo lift. In response to the RFP which requested proposals for either cargo or personnel airlift or a combination of both, the Panel finds that Muller and Partner's proposal only offered a combination of the cargo and passenger lifts and, therefore, could not have been split.

d. The Panel finds no evidence of unequal treatment or an intent to favor Skylink in negotiating with Skylink after the RFP deadline following the determination that Skylink was the lowest acceptable proposer. The evidence

demonstrates that such negotiations with the lowest acceptable proposer were part of the prevailing procedures.

14. The Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink [on the part of the Applicants Robertson, Sellberg and Thompson] in connection with Contract No. 113/92.

a. The Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink with respect to Aircontact's proposal. The Panel, however, finds that reference to the assumptions used to evaluate Aircontact's proposal should have been made to the HCC.

b. The Panel finds no evidence of an intent to misinform or provide incomplete information to the HCC with respect to Skylink's proposal. With respect to the passenger costs associated with Skylink's proposal, the Panel finds that the passenger portion of Skylink's original proposal was $621,000 for three passenger flights at a cost of $742 per passenger. Following the negotiations with Skylink, the Panel finds that the passenger portion of Skylink's proposal became $298,000 (representing a cost of $356 per passenger), which was for one passenger flight and the transportation of 550 passengers who were to travel on the cargo flights.

c. With respect to the amendment of Contract No. 113/92 to cover two flights stopping in Kuwait City, the Panel finds that the presentation to the HCC was inaccurate (i) regarding the requests by the Tunisian authorities and the FOD requisition, and (ii) insofar as it did not reflect the rapidly changing nature of the requirements associated with these requests. The Panel, however, finds no evidence of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink and, as noted above, the evidence demonstrates that two flights, in fact, went to Kuwait City.

15. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Robertson, Sellberg and Thompson] in connection with Contract No. 113/92.

6. <u>Contract No. 139/92</u>

16. The Panel finds no evidence of an intent [on the part of the Applicants Robertson, Sellberg and Thompson] to misinform or provide

incomplete information to the HCC for the benefit of Skylink in connection with Contract No. 139/92 and the amendment thereto.

a. The Panel finds no evidence of an intent to conceal from the HCC the delay in the arrival of the two helicopters. In paragraph 4 of the presentation to the HCC, reference is made to the fact that the helicopters had not yet arrived. The Panel finds that such reference refutes the allegation of concealment.

b. The Panel finds no evidence that Skylink failed to meet its contractual obligations under Contract No. 139/92 and, therefore, finds no concealment from the HCC of any failure by Skylink to so perform [and no failure to take steps to recover costs from Skylink based on breach of contract].

c. The Panel finds no evidence that FMPS 'had serious doubts as to Skylink's reliability' at the time of the presentation to the HCC and, therefore, finds no evidence of an intent to conceal such alleged doubts.

17. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Robertson, Sellberg and Thompson] in connection with Contract No. 139/92.

7. Contract No. 259/92

18. The Panel finds no evidence [of unequal treatment of vendors or an intent to favor Skylink on the part of the Applicants Eren, Robertson and Thompson, or of the misuse of expertise by the Applicant Thompson] in connection with Contract No. 259/92.

a. The Panel finds no evidence of unequal treatment or an intent to favor Skylink [in connection with FMPS' consideration of Skylink's proposal, or FOD's expert advice given in connection with the evaluation of Skylink's proposal]. The Panel, taking into account that IL-62s are passenger aircraft exclusively, finds that Skylink made an obvious clerical error in citing such aircraft for transportation of cargo and, therefore, that the Procurement Officer acted properly in seeking clarification and correction. Once it was determined that Skylink meant the IL-76 cargo plane, the Panel finds that the evidence demonstrates that the only type of IL-76 certified for commercial cargo flights in the international market, IL-76TD, had a capacity of 45 tons (i.e., 135 tons for three IL-76TDs) and, therefore, could satisfy the RFP requirements. The Panel finds no evidence of unequal

treatment or an intent to favor Skylink in [FMPS' or FOD's] determination that Skylink was the lowest acceptable proposer.

b. The Panel finds no evidence of unequal treatment or an intent to favor Skylink in connection with [FMPS'or FOD's] consideration of the other proposals submitted in connection with Contract No. 259/92. The evidence demonstrates that the proposals submitted by other vendors were either more expensive than Skylink's or were unable to meet the RFP requirements.

19. The Panel [thus] finds no evidence of an intent [on the part of the Applicants Eren and Robertson to misinform or provide incomplete information to the HCC for the benefit of Skylink, or on the part of the Applicant Thompson to misrepresent the facts in order to favor Skylink] with respect to the proposals made by Aircontact and Skylink. [The CPTS presentation to the HCC did not include a written evaluation by FOD and, while the Panel finds that such presentation] lacked the information necessary to enable the HCC to reconstruct the decision-making process used by FMPS and FOD, the Panel finds that the missing information would only have reinforced the recommendation of the award to Skylink contained in CPTS' presentation to the HCC.

20. Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicants Eren, Robertson and Thompson] in connection with Contract No. 259/92.

[21.] The Panel finds that the Applicant Sellberg was out of the office on sick leave on 17 and 18 December 1992, and did not participate in the evaluation of the proposals, the presentation to the HCC, nor the deliberations of the HCC in connection with Contract No. 259/92.

[22.] Consequently, the Panel finds that the Applicant Sellberg could not be charged with misconduct in connection with Contract No. 259/92.

[1]. Contract No. 71/90

[23.] The Panel finds no evidence of unequal treatment of vendors or an intent to favor Skylink by [the Applicant Sellberg] in connection with Contract No. 71/90. The Panel finds that the forwarding of Skylink's proposal -- the lowest offer received -- to FOD was done to bring to FOD's attention the possible financial savings for the United Nations.

[24.] The Panel finds no evidence on the part of [the Applicant Sellberg] of an intent to misinform or provide incomplete information to the HCC for the benefit of Skylink. While [the Procurement Officer in FMPS

assigned to this contract's] reference to "other sources" may have been inaccurate or unclear, the Panel finds that such information could not have influenced HCC's acceptance of CPTS' recommendation of the award to Skylink because, once Hawaiian Airlines withdrew, (i) Skylink was the only offeror and (ii) the award was granted on the basis of exigency.

[25.] Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicant Sellberg] in connection with Contract No. 71/90

[3]. AUSCO Case File 2-79635 (subcontract)

[26.] The Panel finds no evidence of unequal treatment of vendors or an intent to favor Skylink on the part of [the Applicant Sellberg] in connection with the AUSCO Case File 2-79635. The evidence demonstrates that FMPS made reasonable efforts to contact Aeroflot in connection with this matter.

[27.] Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicant Sellberg] in connection with AUSCO Case File 2-79635

[6.] Contract No. 215/92

[28.] The Panel finds no evidence on the part of [the Applicant Thompson] of favoritism toward Skylink or misrepresentation of logistical requirements in connection with the inclusion of Skylink's 'aircraft flight follow-up system' in Contract No. 215/92.

[29.] The Panel finds no evidence that [the Applicant Thompson] had reason to believe that the certification of Skylink invoices which included charges for the aircraft flight follow-up system was improper or false.

[30.] Accordingly, the Panel finds no evidence of misconduct on the part of [the Applicant Thompson] in connection with Contract No. 215/92."

The JDC also made the following general findings:

"C. General Findings

1. Context of the Contracts and Conduct Involved in This Disciplinary Proceeding

31. The Panel considers it essential that the charges be seen in the context of the overall working environment within FMPS and FOD during 1992, the year in which all but one of the contracts at issue in this

proceeding were awarded. This working environment ... is illustrated by the following salient data.

32. In 1992, the seven (7) Professional staff members in FMPS handled 190 contracts involving a total value of procurement of $477.3 million. This volume is in stark contrast with previous years when six (1990) or seven (1991) Professional staff members handled substantially fewer contracts, e.g., 1991 - 72 contracts; total value of procurement $121.2 million, 1990 - 46 contracts; total value of procurement $53.9 million. Likewise, within FOD during that same year, LCS raised a total of 2,742 requisitions whereas, in 1990 and 1991, the total number of requisitions was 1,743 and 1,967, respectively. Requests for additional staffing in light of the significant and unprecedented expansion of peace-keeping and related activities did not elicit a commensurate response from the Organization.[1]

33. The initial review ordered by the Administration of the contracts awarded to Skylink involved 52 contracts (...) out of 85 contracts awarded to Skylink in the period from 1990 through 1992. The charges before the Ad Hoc JDC relate to [six (6) contracts in the case of the Applicant Eren, eight (8) contracts in the case of the Applicants Robertson and Thompson, and ten (10) contracts in the case of the Applicant Sellberg]. The Administration thus made no allegations of favoritism with respect to the large majority of contracts awarded to Skylink.

34. The majority of the contracts involved in this proceeding relate to procurement for UNTAC which, due to the Paris Agreement, created critical and urgent deadlines for the movement of thousands of troops and their equipment to Cambodia within a few months in 1992. Often the time between receipt of an FOD requisition within FMPS, award of the contract, and implementation of the contract requirements by the contractor, was a matter of days.[2]

35. In this environment of constant pressure and ever-changing requirements,[3] the Panel observed that the Procurement Manual was inadequate in that, while it covered the bidding process, it did not cover the Request for Proposal ("RFP") process although this had become a key instrument for meeting the needs of peacekeeping missions. It is important to distinguish between the two: while the bidding process asks for quotes for products with clear and unambiguous specifications, making the evaluation process relatively straight-forward, the RFP process asks

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1 [Footnote omitted].

2 [Footnote omitted].

3 [Footnote omitted].

for quotes on services, leaving it to the vendors to specify how they intend to meet the RFP's requirements. This is a far more flexible process, and thus is more demanding in terms of the technical and financial analysis needed to evaluate proposals and select the most suitable vendor. Yet, official guidelines for the RFP process were still lacking in 1992. Moreover, the Procurement Manual did not cover emergency situations where immediate action was required, nor did it cover situations involving on-going changes in requisition and RFP requirements.

36. The difficulties involved in meeting the needs of peacekeeping missions were compounded by other factors. Operational decisions often involved a cast of geographically and organizationally disparate players -- with communication channels frequently not functioning optimally. In addition, new and unprecedented challenges (e.g., large-scale movements of troops from countries with little logistical capacity; inability of troop-contributing countries to meet deadlines and commitments; and lack of infrastructure in the mission areas) required imaginative solutions and rapid improvisation as no relevant guidelines existed and past experience could not serve as a guide.

37. Under the foregoing circumstances, it is understandable that the management culture within FMPS and FOD was focused on meeting the immediate operational requirements of the peacekeeping missions and not on maintaining detailed documentation of contacts with vendors or the decision-making process for evaluation of proposals. This culture was acknowledged by the decision-making process in the HCC, which rarely requested more information than was provided in CPTS presentations or accompanying FOD evaluations: the amount of information supplied was in conformity with the amount of information demanded. This culture was one in which the HCC and the supervisors involved -- as is the case throughout the Organization and, indeed, in most private and public organizations -- trusted the veracity and professionalism of their subordinates and colleagues, and focused on issues of operational effectiveness.

2. Panel's Comments on the Performance of Staff Members

38. Given the foregoing circumstances within FMPS and FOD, it is unsurprising that the Panel found situations when it would have been desirable for a staff member (a) to have made a follow-up call (Contract No. 54/92 and Contract Nos. 62/92 and 111/92), (b) to have made a note to the file regarding contact with a vendor (Contract Nos. 62/92 and 111/92), (c) to have prepared an HCC presentation or FOD evaluation (i) in a less summary fashion to enable the HCC to reconstruct the evaluation process (Contract No. 23/92, Contract No. 113/92 and Contract No. 259/92) or (ii) without certain inaccuracies in such presentations and

evaluations (Contract Nos. 62/92 and 111/92, and Contract No. 259/92), and (d) to have formulated a better contract (Contract No. 23/92 and Contract No. 62/92).

39. The Panel, however, found no evidence -- based on such occasions described in the previous paragraph or otherwise -- of unequal treatment of vendors to favor Skylink or an intent to misinform or provide incomplete information to the HCC to favor Skylink.

40. Moreover, the Panel notes that, as a result of the hard work of the FMPS and FOD staff members under difficult circumstances, there is no suggestion in the charges against [the Applicants Eren, Robertson, Sellberg and Thompson] that the urgent requirements of UNTAC and the other peace-keeping missions were not met.

[3.] Panel's Comments on the Charges

a. Standard of Proof

41. Based on a review of United Nations Administrative Tribunal Judgements, the Ad Hoc JDC determined that the burden of proof in disciplinary matters is guided by the following principle: Once the Secretary-General finds or establishes that misconduct has occurred, the burden shifts to the staff member to produce satisfactory evidence that such misconduct has not occurred or that he or she is not responsible for such misconduct.

42. This principle has been applied by the Administrative Tribunal in numerous disciplinary cases. For example, in UNAT Judgement No. 490 (Liu, para. VII), the Tribunal stated: 'Once the Secretary-General establishes a false or inaccurate certification ... it is then the responsibility of the staff member to present a satisfactory explanation' (emphasis added). Similarly, in UNAT Judgement No. 484 (Omosola, para. II), the Tribunal held that 'once a prima facie case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question. The Tribunal recognizes ... the need for presentation by the Respondent of adequate evidence ...'. In Lindblad, the Tribunal pointed out that a staff member has the right to have an 'opportunity to participate in the examination of the evidence' (Judgement No. 183, para. VII).

43. The Administration has asserted in this proceeding that it has the following standard of proof: '[O]nce the record gives cause to believe that the staff member has failed to meet the highest standards of integrity expected from all staff of the United Nations, it is for the staff member to supply a satisfactory explanation to his or her employer'. (Closing Statement submitted 14 June 1994 by the Representative of the Secretary-General). In this regard, the

Representative of the Secretary-General stated that this position was expressed by the Administrative Tribunal in Judgements Nos. 445 (Morales) and 479 (Caine).

44. The Morales and Caine cases, however, differ from the present proceeding and provide further evidence of the burden of proof described above. These cases differ from the present proceeding in two significant respects: first, in Morales and Caine, questions of fact and the guilt of the staff members were not in dispute. Second, the Secretary-General had properly established the occurrence of misconduct and the culpability of the staff members involved. In Morales, the staff member had filed income tax returns with the Organization which were different from those submitted to the IRS for three consecutive years. This was an established fact and was not denied by the staff member. The issue before the Administrative Tribunal was whether the Secretary-General had the further burden to prove 'intent to defraud' once it was established that the staff member had committed such conduct. The Administrative Tribunal concluded that 'once the Secretary-General establishes "double filing" and related false certifications, the burden is then on the staff member to adduce satisfactory exculpatory evidence' (para. IV). In Caine, the staff member was charged with misappropriation of United Nations' funds. There was irrefutable evidence of fraud, forgery and embezzlement of funds. The evidence was further supported by the findings of a handwriting expert. As in Morales, the main issue was whether the Secretary-General should establish the staff member's intent to commit the offense. The Administrative Tribunal decided that the Secretary-General 'is not required to establish beyond any reasonable doubt a patent intent to commit alleged irregularities' (para. III). These facts further demonstrate that the burden of proof shifts to the staff member only after the Secretary-General establishes that misconduct has occurred.

45. In this proceeding, the Panel found that the Administration did not submit sufficient evidence to establish that misconduct had occurred and, accordingly, under UNAT jurisprudence, the burden did not shift to the staff members. The Panel, however, concluded that even under the standard of proof enunciated by the Representative of the Secretary-General, [the Applicant] Robertson and the other staff members satisfied such burden by producing evidence sufficient to answer the allegations against them.

b. Panel's Perspective on the Charges

46. The interpretations of the staff members' actions reflected in the charges appeared to the Panel to have resulted to a large extent from the lack of clarity in the Organization's procedures with respect to RFPs and the types of contracts required for peacekeeping operations, as well as the lack of clarity in the documentation related to the contracts.

47. The Panel also concluded that the charges suffered from (a) the lack of a thorough, exhaustive examination of the available documentation, e.g., the responsibility of the Processing Unit, rather than FMPS, for determining the timeliness of proposals, (b) the failure to contact certain individuals who had involvement with and relevant information regarding these matters, e.g., Captain Bender, Captain Pieringer, Major Hornsby and Lt. Col. Wolfgang Lange, and (c) the lack of specific technical knowledge in some of the areas under examination, e.g., aircraft type and capacity.

c. Panel's Comments on 'Pattern' of Conduct

48. The Panel considered that, in order for a 'pattern' of misconduct to exist, there must be a repetition of acts which individually constitute misconduct. The 'pattern' of misconduct alleged by the Administration involves acts of alleged unequal treatment and favoritism to Skylink. In this proceeding, the Panel focused on each and every allegation and found no instance of unequal treatment or favoritism toward Skylink. Consequently, the Panel finds no evidence of a 'pattern' of unequal treatment or other misconduct.

49. The charges do not allege conspiracy or collusion by [the Applicant] Robertson with any of the many individuals involved in the decision to award Skylink the subject contracts.

50. The Panel observed that many individuals were involved in the evaluations and decisions that went into awarding Skylink the contracts at issue in this proceeding. At least four different individuals within FOD performed technical evaluations and made recommendations to award Skylink these contracts. Four different procurement officers within FMPS performed the financial evaluations. Moreover, the resulting recommendations, in each case, were approved by the HCC. Frequently, the staff members charged were confirming recommendations made by subordinates or individuals in another section -- not changing such recommendations. Under such circumstances, if the staff member charged did not overturn such recommendations and there were no allegations of collusion or conspiracy, the Panel found it difficult to discern how any individual staff member charged could have given unequal treatment or favored Skylink in connection with an award.] "

Based on its findings, the JDC made the following recommendation:

"V. **RECOMMENDATION**

51. The Ad Hoc JDC unanimously advises the Secretary-General that it did not find any evidence of misconduct on the part of [the Applicant Eren] in connection with the charges.

52. The Ad Hoc JDC unanimously recommends to the Secretary-General that no disciplinary measures be taken against [the Applicants Robertson, Sellberg and Thompson]."

On 21 December 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JDC report to each of the Applicants and informed them as follows:

"The Secretary-General has re-examined your case in the light of the recommendation contained in Report No. [91,92,93,94] that no disciplinary measures be taken against you.

The Secretary-General has noted that, while making the above-noted recommendation, the Report also sets forth a number of instances where, in the judgement of the Secretary-General, you have failed to observe the standard of performance expected of you, amounting to unsatisfactory conduct within the meaning of staff regulation 10.2. These instances, the most numerous of which consist of making inaccurate or incomplete presentations to the Headquarters Contracts Committee, are set forth in an annex to this letter. Having regard to the central role of the Committee in the Organization's procurement process, and to its dependence for proper decisions on the quality of the presentations submitted to it, such errors or omissions must be regarded as culpable.

The Secretary-General has also noted that in numerous instances the JDC has excused your unsatisfactory conduct on the basis that a wrongful intent accompanying that conduct was not established. The Secretary-General wishes to state that, where a staff member's conduct is in breach of an applicable regulation, rule or administrative issuance, or falls below the standard expected of an international civil servant, such conduct would be considered as culpable, and the absence of an accompanying wrongful intent would not constitute an excuse.

Nevertheless, while noting that procurement activities quite often take place under time constraints, the Secretary-General has taken account of the observations of the JDC concerning the severe constraints to which you were often subject due to staff shortages and time pressures. The Secretary-General has also taken into consideration your past years of good service."

The letter to the Applicant Eren concluded as follows:

"The Secretary-General has concluded, however, that even allowing for such mitigating factors, your performance of the duties entrusted to you fell below the standard acceptable in this Organization.

Taking into account the mitigating circumstances noted above, the Secretary-General has decided that, if you had continued to be a staff member subject to disciplinary action, he would have imposed on you a written censure, a four steps-in-grade reduction, and a two year deferment of eligibility for within-grade-increment."

The letter to the Applicants Robertson and Sellberg concluded as follows:

"The Secretary-General has concluded, however, that even allowing for such mitigating factors, your performance of the duties entrusted to you fell below the standard acceptable in this Organization. He has furthermore lost confidence in your ability to perform adequately the important functions of the post you occupied.

Taking into account the mitigating circumstances referred to above the Secretary-General has decided to impose on you a written censure, a four steps-in-grade reduction, and a two year deferment of eligibility for within-grade-increment. This letter imposes these disciplinary measures as specified in staff rule 110.3(a)."

The letter to the Applicant Thompson concluded as follows:

"The Secretary-General has concluded, however, that even allowing for such mitigating factors, your performance of the duties entrusted to you fell below the standard acceptable in this Organization.

> The Secretary-General has noted that since the conclusion of the JDC proceedings you have separated from the Organization and are therefore no longer a staff member.
>
> Taking into account the mitigating circumstances noted above, the Secretary-General has decided that, if you had continued to be a staff member subject to disciplinary action, he would have imposed on you a written censure, a four steps-in-grade reduction, and a two year deferment of eligibility for within-grade-increment."

On 21 March 1995, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The investigation of the Applicants and the harsh measures of suspension taken by the Respondent were motivated by extraneous factors, including media rumors and political pressure. There was no indication that the Applicants' conduct might pose a danger or risk to justify suspension of the Applicants.

2. The Respondent has erred in conceiving his broad discretion with regard to disciplinary matters as an unchallengeable authority to disregard the factual findings and conclusions of the JDC, which were that no acts of misconduct had been committed by the Applicants.

3. The Respondent's decision to impose disciplinary measures for alleged errors pertaining to the Applicants' performance and not to their conduct is vitiated by a serious mistake of law. Under staff rule 110.3, performance falls within the competence of supervisory officials and is not subject to disciplinary measures.

Whereas the Respondent's principal contentions are:

1. The investigation of the allegations against the Applicants was not improperly motivated and their suspension was a proper exercise of the Respondent's discretion.

2. The Respondent is not bound to accept the conclusions and recommendations of the JDC. He has broad discretion in determining what constitutes unsatisfactory conduct.

3. The Applicants' failure to fulfill functional duties in accordance with the Charter of the United Nations and relevant regulations, rules and administrative issuances constituted unsatisfactory conduct. Such conduct cannot be excused by the alleged absence of wrongful intent.

The Tribunal, having deliberated from 27 October to 22 November 1995, now pronounces the following judgement:

I. The Tribunal joins the applications of the four Applicants - Eren, Robertson, Sellberg and Thompson - as their cases involve common issues of fact and law. The Tribunal will consider these four cases in this single judgement. The Applicant Sellberg, having died during the pendency of this appeal, will be replaced by his estate, pursuant to article 2, paragraph (a) of the Tribunal's Statute.

II. The Applicants, in their respective posts, dealt with the procurement of air transportation services for the United Nations. The Applicant Robertson was Chief of Commercial, Purchase and Transportation Service (CPTS). The Applicant Sellberg was Chief of the Field Missions Procurement Section (FMPS). The Applicant Eren was a Procurement Officer at FMPS, CPTS in the Office of General Services. The Applicant Thompson was Officer-in-Charge, Logistics and Communications Section.

In May 1993, a complaint was made by Evergreen Helicopters, Inc., a U.S. company, alleging irregularities in UN procurement practices which, it was claimed, had resulted in awards to companies which were not the lowest bidders. Evergreen further alleged that

these awards went principally to one Canadian helicopter broker. This complaint was sent to members of the legislative branch of the United States Government and to the Secretary-General. It prompted a preliminary investigation by the Administration which included a review of the contracts awarded to Skylink, the broker in question. The investigation led to an initial conclusion by the Administration that practically all of the 52 contracts reviewed showed non-compliance with established procurement procedures. Consequently, on 9 July 1993, the Applicants were charged with misconduct and suspended from duty with full pay, with immediate effect. They were escorted from their offices, in full view of their colleagues, in a melodramatic fashion, by Security Officers, to the gates of UN Headquarters and ceremoniously stripped of their ground passes.

III. Each Applicant was informed by the Respondent that his conduct: (1) was not in compliance with his obligations under staff regulation 1.1; (2) violated his oath of office to discharge his functions and to regulate his conduct with the interests of the United Nations only in view, and (3) did not conform to the standards of conduct expected of all staff members, or in the case of the Applicant Thompson, to the standards of integrity expected of all personnel serving with the Organization. The Respondent further alleged that the Applicants' conduct had denied the UN the benefits of proper competitive bidding and of the safeguards provided by the Financial Regulations, Rules and Procurement Procedures. The UN, it was claimed, had to pay more for air transportation services than might otherwise have been the case.

IV. In their initial response to the charges against them, arising out of the preliminary investigation, the Applicants denied any wrongdoing. Their cases were subsequently referred to a Joint Disciplinary Committee (JDC). Although 52 procurement cases had been reviewed in the preliminary investigation, in the proceedings

before the JDC, the Applicants were charged with misconduct in a relatively small number of them, ranging from six to ten. The charges against the Applicants focused on action allegedly taken by them to favour Skylink. The Applicants were accused of having concealed relevant information and of having submitted to the Headquarters Committee on Contracts incomplete, misleading, or inaccurate information. Their purpose was, allegedly, to induce the Committee to recommend the award of contracts to Skylink. It was only in this context that the Administration referred their alleged conduct to the JDC as warranting disciplinary action.

V. The JDC adopted its lengthy reports on 21 September 1994. In every case, the JDC carefully reviewed the procurement process with respect to the contracts in question. It considered every allegation which had been made by the Organization against each of the Applicants. The Applicants were exonerated by the JDC in all respects of the charges of misconduct against them. The JDC found no evidence of unequal treatment of vendors with intent to favour Skylink, and no evidence of intent to mislead or misinform the Headquarters Committee on Contracts. Equally important, no instance was found in which the UN paid more than it would otherwise have had to pay for air transportation services because of any improper conduct by the Applicants.

VI. In its general findings, the JDC examined the realities of the working environment in which the Applicants were functioning at the time the contracts in question were negotiated. The JDC noted that in 1992, seven professional staff members were handling 190 procurement contracts involving a total value of $477.3 million. In contrast, the same number of staff had handled 72 procurement contracts in 1991, with a total value of $121.2 million. The year before, in 1990, they had handled only 46 procurement contracts with

a total value of $53.9 million. The JDC noted that requests for additional staffing to cope with this dramatic increase in workload had not been granted.

VII. The Tribunal notes, as perhaps of even greater importance, the nature of the procurements involved air transport services for personnel and materiel, which often had to be provided on very short notice. This required co-ordination, on tight time schedules, of the availability and location of aircraft with the schedules of military and other personnel and equipment being transported to, from and between remote locations. The complexities involved frequently imposed daunting requirements for rapid action and reaction on the part of the procurement officers in calling for, evaluating, and reporting on proposals from potential contractors. The alternative continually faced by them was intolerable delay or failure to fulfill the operational demands of peacekeeping missions.

VIII. Against this background, the JDC noted occasional instances in the invitation, evaluation and reporting of proposals from potential contractors where it would have been desirable for the staff members involved to have made a follow-up phone call, or written a note to the file regarding contact with a vendor, or prepared presentations to the Headquarters Contracts Committee in a less summary fashion. The JDC also noted that there had been occasional inaccuracies in their presentations. However, the JDC found no evidence of wrongful intent on the part of the Applicants. It depicted such lapses as understandable, in the light of the circumstances, such as understaffing and the urgency of the requisitions involved. In no instance did the JDC find that the outcome with respect to any particular contract would have been different had these lapses not occurred.

IX. The unanimous recommendation of the JDC was that no disciplinary measure be taken against the Applicants. On 21 December 1994, the Under-Secretary-General for Administration and Management informed each of the Applicants of the Secretary-General's decision on the JDC recommendation. While accepting the findings of the JDC that no wrongful intent on the part of the Applicants had been established, the Secretary-General nevertheless decided to impose disciplinary measures, on the grounds that the performance lapses noted by the JDC were not excused by the absence of wrongful intent, and that the errors and omissions identified by the JDC should be "regarded as culpable". In the case of those Applicants who had separated, he decided that he would have imposed disciplinary measures on the same grounds. The Under-Secretary-General annexed to his letters extracts from the JDC reports which mentioned the errors and omissions referred to above.

X. The manner in which the Secretary-General's decision dealt with the JDC report is challenged by each of the Applicants. The Tribunal has considered in detail the reports of the JDC. It finds that the JDC in its reports, which range from 168 to 299 pages, conducted a comprehensive and meticulous analysis of the evidence regarding each contract with which each Applicant was concerned, and each allegation against the Applicants. The Tribunal accepts the factual findings of the JDC, as did the Respondent, and commends the JDC for its impressive work.

XI. The central question before the Tribunal is whether the Secretary-General, having accepted the factual findings of the JDC and its conclusion that the Applicants were not guilty of the charges brought against them, could then validly impose disciplinary measures on the basis of incidental comments on what are essentially matters of performance. The Tribunal notes that since the points covered by these incidental comments, which, as the charges show,

the Respondent was aware of from the outset, had been referred to the JDC by him as warranting disciplinary action only in the context of wrongful intent, the Applicants had occasion to address them tangentially in that context only, if at all.

XII. The provisions of staff rule 110, governing disciplinary proceedings, are designed to ensure that due process protection is afforded to staff members who are accused by the Administration of having engaged in misconduct. The aim is to provide them with an opportunity to present arguments and evidence refuting the charges of misconduct, or to be taken into account in mitigation. In this way, the staff member has an opportunity to tell his or her side of the story, and to offer alternative inferences that may be drawn from the evidence. All of this is then taken into account in determining what happened, who, if anyone, should be held responsible, and what, if any, action should be taken by the Respondent.

XIII. The disciplinary procedure through the JDC stage functioned effectively with regard to the original charges of misconduct. The Applicants had an opportunity to know and respond to the charges against them. Based on all of the information available to it, the JDC arrived at well-supported findings and conclusions on the charges against the Applicants of corrupt practices with respect to air transportation contracts.

XIV. The Secretary-General, on the basis of his own examination of the evidence, could have rejected the JDC's findings, and determined that the Applicants were guilty of the charges against them. If he had done so and imposed disciplinary measures, the questions for this Tribunal would have been (a) whether his determination was arbitrary, based on mistake of fact or law, or influenced by prejudice, bias, or some other extraneous factor, or, (b) if

disciplinary action was found by him to be justified, whether the severity of the disciplinary measures imposed was disproportionate and, in the circumstances, constituted an abuse of his discretion. But the Secretary-General accepted the JDC finding that the Applicants were not guilty of the charges against them. Despite this, he imposed disciplinary measures on them on the basis of a charge, not previously notified to the Applicants, that their performance was culpable because it was, in certain respects, below standard. This is fundamentally different from the original charges against the Applicants. While the original charges included reference to performance issues such as allegedly providing inadequate, incomplete and incorrect information to the Headquarters Contracts Committee, the gravamen of the charges referred by the Administration to the JDC was, as noted above, wrongful intent to favour Skylink.

XV. This shift in grounds reflected in the Respondent's decision raises a serious question with regard to due process. The Tribunal is of the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member must be fully apprised of the charges against him or her so as to know what to respond to. When the charges are referred to a JDC, the Applicant and the Respondent must have the benefit of the JDC's considerations and findings. Here, the Applicants responded successfully to misconduct charges based entirely on an alleged wrongful intent, but were subjected to disciplinary measures on a different ground. They were not accorded the opportunity to respond to what, in effect, was a different charge. Similarly, the JDC did not have before it any issue of misconduct based purely on the performance matters mentioned above. The JDC commented on what it apparently perceived as shortcomings in the Applicants' performance, but did so solely in the context of far more serious charges, which were virtually criminal in nature. Neither the Applicants nor the

JDC were called upon to consider, much less to concentrate on, whether the Applicants' job performance, as such, was so deficient as to warrant disciplinary action, in the light of the extraordinary work circumstances prevailing and other mitigating factors, many of which were recognized by the JDC. Hence, the Applicants were denied the due process to which they were entitled under the Staff Rules. The disciplinary measures imposed on them were therefore unlawful.

XVI. In theory, the isolated comments of the JDC might have been the basis for new charges against the Applicants. These could have been referred to the JDC for consideration and for a recommendation as to whether they warranted disciplinary action. The Tribunal questions, however, whether matters of below-standard work performance, as distinct from the sort of misconduct that ordinarily raises disciplinary issues, are appropriate matters for referral to a JDC. This question need not be decided here. There might be instances when failures in performance are of such extreme dimension as to constitute misconduct for which disciplinary measures would be reasonable. In the circumstances here, the Tribunal does not find that the performance matters mentioned by the JDC are of this nature, absent the wrongful intent originally charged.

XVII. This is particularly true, since as noted above, there appears to be no evidence of any financial loss to the Organization, or that any outcome would have been different but for the Applicants' performance. In addition, the JDC noted that the Applicants sought, where possible, to maximize savings for the Organization by, for example, splitting awards to obtain the benefits of the most advantageous proposals. Following his review of the JDC report, nothing to the contrary was alleged by the Respondent.

XVIII. The Tribunal also finds that relevant matters relating to the work performance of the Applicants do not appear to have been taken into account in the determination that their conduct was "culpable". As noted by the JDC, for example, the Procurement Manual which sets forth the procedures to be followed in the bidding process, does not set forth procedures to be followed in the Request for Proposal (RFP) process. The RFP process, used in negotiated procurement of services, often requires, among other things, more demanding technical and financial analysis than the advertised bid process. It was recognized by the Administration that the development of a procurement manual dealing with negotiated procurements would be appropriate. This is shown by a reference in the existing Procurement Manual to a missing Part II, which was supposed to cover negotiated transportation service procurements. The Tribunal was advised by a memorandum dated 26 October 1995, from the Director, Buildings & Commercial Services Division, that the original draft of Part II "was never completed, finalized, nor issued." In the absence of such a manual, legitimate questions arise as to whether and to what extent pressure-induced decisions regarding procedural details in the procurement process can properly be deemed "culpable".

XIX. The Applicants also cite a memorandum dated 5 October 1994, from the Under-Secretary-General for Administration and Management to all Assistant Secretaries-General, Directors, and Section Chiefs emphasizing the need to respond speedily to emergencies, humanitarian needs of peace-keeping missions and other similar operations. The Under-Secretary-General urged rapid decision-making, the use of verbal communications rather than memoranda "whenever possible". He noted that "rules are developed to provide safeguards, which cannot be strictly followed in emergency situations such as the ones we have in human rights, humanitarian

affairs and peace-keeping." It appears to the Tribunal that the Applicants acted in keeping with the views expressed by the Under-Secretary-General. In short, what he later considered lapses in their performance could well have resulted directly from his eminently sensible advice.

XX. Indeed, the JDC noted in its reports that there was no suggestion that the urgent requirements of the peace-keeping missions, being supported by the Applicants' efforts, were not met. In view of this unchallenged finding and the foregoing discussion, the Tribunal concludes that, in addition to the failure of due process, the disciplinary measures taken by the Respondent were not justified.

XXI. The Applicants submitted to the Tribunal, as an annex to their written observations, a communication dated 30 August 1994, from the Assistant Secretary-General for the Office of Internal Oversight Services to the Under-Secretary-General for Administration and Management. The Tribunal will consider only the relevant portion of the memorandum, which reads as follows:

> "In this regard I would like to advise that regardless of the outcome of the JDC proceedings, the former PTS officials [the Applicants] must not be permitted to resume their previous positions, <u>even if they are exonerated</u>. To do otherwise will surely result in widespread negative repercussions, including a further deterioration of morale and motivation among the existing staff members." (Emphasis added)

These sentences relate specifically to the Applicants and are germane to the applications before the Tribunal. With regard to the substance of the matter, the Tribunal is dismayed, not only by the proposed prejudgement and denial of due process rights contained therein, but also by the apparent illogic of the reason advanced for

it. The suggestion by the Assistant Secretary-General for the Office of Internal Oversight Services that even if the investigation then under way were to exonerate the Applicants, it should be decided in advance to treat them as if they had been found guilty, is abhorrent to the most basic concepts of justice and fair play. In response to an inquiry by the Tribunal, the Under-Secretary-General for Administration and Management has stated that he had no specific recollection of having seen this document and that his decision was unaffected by it when he considered the JDC recommendations on the Applicants' cases. The Tribunal accepts this statement by the Under-Secretary-General.

XXII. With regard to the suspension of the Applicants, pending the disposition of charges against them, the Tribunal finds that such action was plainly within the reasonable discretion of the Respondent under the circumstances, considering the seriousness of the charges. The Respondent was entitled, at that stage, to decide that retaining the Applicants in their posts might pose a danger to the Organization. Having said this, however, the Tribunal notes that the rather extraordinary manner in which the suspension was carried out could not help but unfairly create a public impression that the Applicants were unquestionably guilty of the charges against them. While the JDC report exonerates the Applicants of misconduct and goes far toward restoring their reputations, the imposition of the disciplinary measures, which the Tribunal has found to be unjustified, tended to undermine the conclusions of the JDC. This is extremely regrettable. The Tribunal hopes that any misimpression created by the Respondent's action can be rectified. The innocence of the Applicants of the serious charges of misconduct against them should have been made known to all concerned more emphatically than it was in the press briefing which took place on 22 December 1994.

XXIII. In conclusion, the Tribunal finds that the Applicants were unfairly and improperly treated by the Respondent when he penalized them, despite the finding of their innocence by the JDC and his own acceptance of this finding. The Applicants were deprived of the due process to which they were entitled and were subjected to a serious irregularity of procedure. The Applicants have been harmed thereby, and their harm has been aggravated by the highly public nature of the Respondent's actions.

XXIV. In the light of the foregoing, the Tribunal:

1. Rescinds the decisions of the Respondent, dated 21 December 1994, to impose disciplinary measures on the Applicants who were staff members and the decisions of the Respondent, dated 21 December 1994, that he would have imposed disciplinary measures on the Applicants who were no longer staff members. It further orders that all references to the imposition of the disciplinary measures be expunged from the personnel files of the Applicants and that a copy of this judgement be placed in them.

2. If, within thirty days of the notification of this Judgement, the Secretary-General decides, in the interest of the United Nations, not to rescind the decisions which imposed, or would have imposed, disciplinary measures, the Tribunal fixes the compensation to be paid to each of the Applicants in the amount of one year's net base salary at the rate in effect on the date of their suspension from service.

3. Orders, in addition, as compensation for the harm suffered by the Applicants, that the Respondent pay the Applicants Eren, Robertson, and Thompson and the estate of the Applicant Sellberg: (a) the sum of $20,000; and (b) the difference in remuneration and other emoluments between what was actually received by the Applicants and what they would have been entitled to, in the absence of disciplinary measures, from the date of their suspension from service to the date on which the Tribunal's Judgement is implemented by the Respondent.

4. Rejects all other pleas.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/745
22 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 745

Case No. 797: HUZEIMA

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 15 May 1994, Ali Abu Huzeima, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application requesting the Tribunal, inter alia:

"1. To give an order to UNRWA to return me to my job at the same grade or to any other similar post and grade.

2. To pay me in full, effective 23 February 1993, until the date of return to work.

3. To compensate me for all sufferings that I, my wife, children and family have gone through during the whole period effective the date of suspension up to date."

Whereas the Respondent filed his answer on 21 October 1994;

Whereas the Applicant filed written observations on 26 December 1995;

Whereas, on 13 November 1995, the Tribunal put a question to the Respondent, to which he provided an answer on 15 November 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 April 1974, as a Clerk "C" at Grade 5, on a temporary indefinite appointment. On 7 November 1974, he was transferred to the post of Despatcher "A" at Grade 6. On 1 December 1975, he was promoted to Grade 7. On 6 July 1980, he was transferred to the post of Vehicle Control Assistant, Grade 9. On 18 July 1981, the Applicant was promoted to Grade 11, as Vehicle Control Officer, and on 1 April 1986, he was transferred to the post of Assistant Field Supply and Transport Officer, Grade 14. On 1 June 1990, he was promoted to Grade 16 as Deputy Field Supply and Transport Officer. On 24 February 1993, the Applicant was demoted and transferred to the post of Administrative Assistant, Grade 10. On the same date, he separated from service on early voluntary retirement.

On 6 October 1992, a meeting was convened to discuss an allegation that the Applicant had assisted a bidder in the completion of a tender document for the supply of shelving. At the meeting, the Applicant stated that, upon request, he had assisted a bidder to complete the form, as the bidder did not speak English. He denied revealing any confidential information. The bid in question, which was the lowest, was deemed to be tainted and excluded from consideration.

On 7 November 1992, the Applicant requested separation from service on medical grounds. He was granted sick leave for several months. On 21 January 1993, he was found to be fit for continued service. On that date, the Applicant was informed that, with effect from 23 January 1993, he would be suspended without pay, pending an investigation. In a memorandum dated 23 January 1993, to the Director of UNRWA Operations, Gaza, the Applicant protested his suspension without pay, asserting that he had not committed any "action against the interest of the Agency". He requested that he be considered "in service but on leave until the investigation is completed."

On 15 February 1993, a Board of Inquiry was appointed. It adopted its report on 23 February 1993. Its findings were:

> "(a) [The Applicant] assisted a tenderer (who was probably illiterate in the English Language) to fill in an Agency Tender document in September, 1992.
>
> (b) [The Applicant] did not inform his supervisor what he had done.
>
> (c) [The Applicant] did not complete the tender document with a view toward securing gain and is therefore not guilty of conflict of interest vis-a-vis the Agency's Area Staff Rules and Regulations (there being no evidence to the contrary).
>
> (d) [The Applicant] has demonstrated poor judgement in the sense that he saw nothing wrong with his actions and as a senior staff member he was unable to perceive he may have been guilty of violating principles of fair tendering and the calling into question the possibility of a conflict of interest both as to the tender of September 1992 and possibly the previous tender of some 18 months ago as stated by ... (...) and ex-FSTO's [Field Supply & Transport Officer's] statement (...).
>
> 12. The Board finds, in conclusion, that the [Applicant's] actions are more ones of improper judgement rather than ones of actual conflict of interest, and as such, a senior staff member of the Agency should have known better."

On 24 February 1993, the Field Administration Officer, Gaza, informed the Applicant that the Director of UNRWA Operations, Gaza, and the UNRWA Representative, Egypt, had reviewed the findings of the Board of Inquiry. They had "decided that you will not be re-instated to your previous job as Deputy Field Supply & Transport Officer. Under Area Staff Regulation 10.2 you will be demoted and transferred to the post of Administrative Assistant, at Grade 10 step 20 level, in the Department of Environmental Affairs with effect from 24 February 1993." He further advised the Applicant that his period of suspension without pay would be converted to suspension with full pay.

In a memorandum dated 24 February 1993, the Applicant informed the Director of UNRWA Operations, Gaza, that he did not accept the demotion. He submitted a request for early voluntary retirement with effect from 23 February 1993. On 27 February 1993, the Applicant requested the Officer-in-Charge, UNRWA Operations, Gaza, to reconsider the decision to demote him and to re-instate him in his post. On 6 March 1993, the Field Personnel Officer, Gaza, advised the Applicant that his request for early voluntary retirement had been approved.

On 22 March 1993, the Applicant wrote to the Commissioner-General, requesting his intervention to allow him to return to his post. On 7 April 1993, he wrote again, noting that action was being taken to fill his post. On 4 May 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 18 August 1993, the JAB adopted its report. Its evaluation and recommendation read, in part, as follows:

"IV. Evaluation and Judgement

19. ...

(a) The Board is of the opinion that the Administration had justifiably imposed a disciplinary measure against the Appellant.

(b) However, the Board can hardly conceive the propriety and proportionality of the measure imposed, taking into consideration the very clean record of the Appellant during his long service with the Agency and his immediate admission of the act of assisting a tenderer to fill in an Agency Tender document for no personal gain.

(c) The Board ascertains that the report of the Board of Inquiry was not incriminating the Appellant inasmuch as it had solely pinpointed his improper judgement as a staff member on one occasion only.

(d) The Board believes that the sequence of events from the time the Appellant was suspended until his option for early retirement was conducive to such

an option and therefore the Board affirms that the Appellant was coerced into opting for early retirement.

V. Recommendation

20. In view thereof, the Board unanimously makes its recommendation that the Administration's decision of 24 February 1993 according to which the Appellant was transferred on demotion from a Grade 16 post to a Grade 10 post be reviewed with a view to providing the Appellant with an opportunity to reconsider his option for early voluntary retirement and that he be served with a disciplinary measure of a milder dimension and that is proportionate with the size of his 'improper judgement' on one occasion only."

On 21 October 1993, the Deputy Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"You will note that the Board concludes that the Administration was justified in imposing a disciplinary measure against you. You will also note the Board's recommendation that your demotion from a Grade 16 post to a Grade 10 post be reviewed with a view to substitution of a less stringent disciplinary measure, thereby giving you an opportunity to reconsider your decision to opt for early voluntary retirement.

I accept the Board's conclusion that the Administration justifiably imposed a disciplinary measure against you. As recommended by the Board, I have also carefully reviewed the actual disciplinary action taken in light of all the circumstances. In doing so, I cannot overlook the fact that your involvement with one tenderer in the course of a tender was improper and, if countenanced, likely to undermine the integrity of the Agency's procurement system. This is particularly so given the position you held as a senior manager and Deputy Field Supply & Transport Officer. However, in order to comply as far as possible with the Board's recommendations, I am prepared to offer you reinstatement into the position of Administrative Assistant, Grade 10 at the Grade 14 level, effective 23 February 1993, when you took early voluntary retirement, with the intervening period between that date and the date of your return to work designated as Special Leave with pay at the Grade 14 level.

> The position offered to you at Grade 14 is four levels higher than originally proposed and is intended to meet the Board's recommendation for a disciplinary measure of a milder dimension and to provide you an opportunity to reconsider your election to take early voluntary retirement. The offer is, of course, contingent upon reimbursement to the Agency of the benefits already paid to you upon your separation."

In a memorandum dated 3 November 1993, to the Field Personnel Officer, the Applicant stated "I accept the offer to occupy GF Grade 14 post." In a reply dated 7 November 1993, the Field Administration Officer advised the Applicant "we will offer you shortly a Grade 10 (not 14) post, which you will occupy under grade protection at Grade 14." On 10 November 1993, the Applicant wrote to the Deputy Commissioner-General requesting clarification of the offer with regard to grade protection. In a reply dated 15 November 1993, the Officer-in-Charge, Headquarters, clarified the offer of reinstatement. On 25 November 1993, the Applicant informed the Field Administration Officer that he would accept an offer of reinstatement to a Grade 10 post at the Grade 14 level "with the same salary or the nearest to the salary I was drawing in my previous post of Grade 16." In a letter dated 19 December 1993, the Field Administration Officer, Gaza, confirmed that the Applicant's salary "would be adjusted to be nearest the salary you were drawing in your previous post." He further stated that this offer was being made "in full and final settlement", concluding "you either accept the offer, which brings the matter to a conclusion, or reject it, in which case any further recourse ... should be addresed to the Administrative Tribunal."

Following further correspondence, on 15 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant acted in good faith. He was found to have exercised "poor judgement", which calls for, at most, a written censure. The Respondent's decision to demote the Applicant is disproportionate to the alleged wrong-doing.

Whereas the Respondent's principal contention is:

The evidence demonstrates that the Respondent's imposition of a disciplinary measure against the Applicant was proper and in accordance with the rules.

The Tribunal, having deliberated from 30 October to 22 November 1995, now pronounces the following judgement:

I. The charge against the Applicant is that, sometime in September/October 1992, he helped a neighbour to fill in a tender-form for a contract with UNRWA at Gaza. The Applicant does not deny that he did so. Nor is there any accusation by the Respondent that the Applicant gained financially in any way by his action or that there was any possibility of UNRWA suffering losses.

II. The Applicant states that on 7 October 1992, he was told by the Director, UNRWA Operations, Gaza, that he considered the Applicant's action as a violation of the Agency's Rules. He would, therefore, not be allowed to return to his post as Deputy Field Supply and Transport Officer. The Applicant states that he was also told that he should ask for early voluntary retirement, leave the Agency on medical grounds or face a Board of Inquiry. According to the Applicant, the Director added, that "whatever the findings of the Board of Inquiry, he will recommend my final dismissal".

III. There has been no contradiction of these statements. Indeed, a letter of 3 November 1992, from the Director to the Applicant, in which a reference was made to "several alternatives from which you might wish to choose were discussed at our last meeting" would seem to confirm the statements attributed to the Respondent. The Tribunal finds that the options given by the Director were premature and rather trenchant, and were decided upon before the facts were properly sifted. Yet they continued to govern all the subsequent developments.

IV. An important feature of this case is the Respondent's conclusion that the Applicant, by his admitted wrong-doing, had committed an act that not only violated the "Requirements as to competitive Quotations" (Organization Directive 10), but that he had abused his position as a senior official who had "responsibility for the Agency's procurement system ... and had access to confidential information regarding tenders of Agency supplies". However, the Tribunal finds that the document entitled "Requirements as to competitive quotations" does not specifically deal with the offence the Applicant committed. These requirements refer more generally to safeguarding "the principle of fair competition". There is no clear evidence of conflict of interest. In the circumstances, the Tribunal considers that the action of the Respondent was based on his determination that the Applicant's conduct would, if countenanced, "undermine the integrity of the procurement system". This determination was not unreasonable and the Tribunal finds no substance in the Applicant's accusation that the action against him was motivated by prejudice and was meant to give his job to someone else.

V. There is, however, evidence that in coming to his conclusion, the Respondent was to some extent influenced by what might have occurred eighteen months earlier and of the Applicant's role in

another tender. At the request of the Tribunal, the Respondent supplied the details of this incident. On 11 October (i.e. about the time the Applicant was reported to have helped in filling in a tender), the Field Supply and Transport Officer, who was the direct supervisor of the Applicant, submitted a "strictly confidential" memorandum to the Director of UNRWA Operations, Gaza and the UNRWA Representative in Egypt which contained, among other matters mainly adverse to the Applicant, the following:

> "... 18 months ago, when I had just been transferred to the post of FSTO/G, [the Applicant] brought the same contractor, Mr. Mimnim to quote for the making of the shelves in the Old General Stores. When we awarded this contract to another supplier, D/FSTO brought a letter from Mr. Mimnim stating that he would reduce his prices below that of the lowest bidder. As this contract was only for $1,000 USD no file was kept on this, however the Supply Officer Procurement, Mr. Muhanna and Supply Officer Warehousing, Mr. Matar will attest to this" (emphasis added).

VI. Mr. Muhanna and Mr. Matar were examined in the middle of February 1993 by the Board of Inquiry. At this inquiry, which met after the Applicant had been transferred from Gaza, "Mr. Matar was unable to give an (sic any) information to the Board regarding this question". Mr. Muhanna recalled the incident 18 months before but stated that to his knowledge "[the Applicant] never interfered with other Agency tenders" and generally spoke in favour of the Applicant. He said that this earlier incident should not be confused with the present accusation against the Applicant. Nonetheless, this incident which presumably took place in April/May 1991 had been referred to more than once as indicative of the Applicant's unacceptable conduct and as an aggravation of his offence which is the subject matter of this case. The Tribunal finds no justification for this, especially in view of the excellent PERs the Applicant always had and in view of the fact that the Respondent did not raise this incident in the proceedings before the

JAB pointing out, in fact, that "the Appellant's performance prior to the incident in question was never at stake".

VII. The Board of Inquiry did not make any recommendation and concluded that the Applicant's "actions are more ones of improper judgement rather than ones of actual conflict of interest, and as such, a senior staff member of the Agency should have known better". On the basis of the Board's report, the Respondent decided that the Applicant would "not be reinstated to [his] previous job as Deputy Field Supply and Transport office". He further decided that under Area Staff Regulation 10.2 the Applicant would be "demoted and transferred to the post of Administrative Assistant, at Grade 10 step 20 level, in the Department of Environment Affairs with effect from 24 February 1993". The Applicant considered this decision unfair and did not accept it. He submitted a request for "early voluntary retirement", which he later stated had been made under the pressure of circumstances, but which the Respondent accepted promptly. Eventually, on 4 May 1993, he lodged an appeal with the JAB which, in its report, adopted on 18 August 1993, recommended that "demotion from Grade 16 to Grade 10 be reviewed with a view to providing the Appellant with an opportunity to reconsider his option for voluntary retirement and that he be served with a disciplinary measure of a milder dimension and that is proportionate with the size of his 'improper judgement' on one occasion only". In response to his recommendation, the Respondent was prepared to offer reinstatement into "the position of Administrative Assistant, Grade 10 at the Grade 14 level".

VIII. The Tribunal finds little difference of substance between Grade 10 Step 20 decided on the report of the Board of Inquiry and Grade 10 with protected salary of Grade 14, offered after the JAB reported. There was at this stage much discussion about a permanent job at Grade 10 which was not available but the Respondent said that

a fixed-term appointment could be offered with no risk of separation. The Applicant insisted that since a job at Grade 14 was available, he should be offered it. This controversy was put to rest when on 8 January 1994, the Field Administrative Officer (FAO) informed the Applicant that "you will be offered a Grade 10 Administrative post at Grade 14 - no more and no less". In other words, his demotion from Grade 16 to Grade 10 was confirmed but his salary and prospects were protected. The Applicant was given until 13 January to decide. In a letter of 11 January, the Applicant noted that he was prepared to accept the offer, "but at the same time to raise [his] case to the United Nations Administrative Tribunal for there [sic] final decision." On 15 January, the Applicant was informed by the FAO: "If you decide to pursue your appeal with the United Nations Administrative Tribunal, it will be regarded as a rejection of the offer of reinstatement." The Tribunal notes that, in this case, the Respondent has merged administrative decisions on the recommendation of the JAB with an offer of settlement. The Tribunal considers that it is unacceptable for the Respondent to introduce into correspondence relating to his decision on the JAB report, the content of a settlement proposal with the condition that the Applicant refrain from appealing to the Tribunal.

IX. The Applicant had admitted his mistake in helping a contractor fill in a tender form. The Tribunal can accept that the Respondent might have felt that the Applicant had intended to help the tenderer obtain the contract. However, there is no evidence clearly compelling such a conclusion.

X. On balance, the Tribunal finds that the Respondent's attitude was to an extent predetermined and somewhat arbitrary. In the circumstances, the Tribunal finds that the Applicant is entitled to

some monetary compensation for the irregularities and avoidable uncertainties he was subjected to. The Tribunal assesses such compensation at $5,000.

XI. In the light of the above, the Tribunal:

(1) Orders the Respondent to pay the Applicant US$ 5,000;

(2) Rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/746
22 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 746

Case No. 811: MUSEIBES

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 September 1994, Hasan Mohd Museibes, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application requesting the Tribunal, inter alia:

"6. Rescinding the false, manipulated ratings of [the] Field Education Officer, SAR [Syrian Arab Republic], and keeping and maintaining the true ratings of Area Education Officer, North.

7. Rescinding the subsequent letter of 'Deferral of Confirmation of Transfer' dated 28 Feb. 1993 ...

...

9. [Payment of] $10,000, ten thousand US dollars in compensation for the immense moral and psychosomatic effect and harm ever since this appeal up till now.

10. [Payment of] $2,000, two thousand US dollars in compensation for the fees of my legal consultants and related expenses.

11. Issuing and distributing fieldwide a letter of apology in English and Arabic to rehabilitate my reputation, and changing the unfair and harmful 'Certificate of Service' accordingly.

12. Reinstating me in my former post of Area Welfare Officer or any equivalent post, and considering the period of time ever since my resignation under duress as from 2 October 1993 until my reinstatement in a post as a 'Special Leave with full Pay'."

Whereas the Respondent filed his answer on 6 April 1995;

Whereas the Applicant filed written observations on 30 May 1995;

Whereas the Applicant submitted additional observations on 15 October 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 May 1987, as an Area Welfare Officer in the Aleppo/Latakia Area of Syria, at grade 7, step 1, on a temporary indefinite appointment. On 1 August 1990, the Applicant was transferred to the post of Area Welfare Officer, Central Homs Area, and on 4 May 1991, to the post of Clerk B, in the Relief and Social Services Department in the Field Office, Damascus, with protected grade and salary. On 1 February 1992, the Applicant was transferred back to the Aleppo Area as an Elementary Teacher, at grade 7. The Applicant resigned, with effect from 1 October 1993.

On 1 February 1993, the Applicant wrote to the Director of UNRWA Affairs, Syrian Arab Republic (SAR), requesting that he be transferred back to the position of Area Welfare Officer or an equivalent post, or that his appointment be terminated pursuant to staff rule 109.1.

On 2 February 1993, a periodic report was prepared, in view of the confirmation of the Applicant's transfer to the post of Elementary Teacher. The Field Education Officer, who signed the

report on 7 February 1993, noted that both signatories of the report, the Applicant's immediate and intermediate supervisors, had over-rated the Applicant. He recommended deferral of his confirmation in the post for three months. On 28 February 1993, the Field Personnel Officer, SAR, informed the Applicant of the decision to defer confirmation of his transfer to the post for three months.

On 15 March 1993, the Applicant wrote to the Director of UNRWA Affairs, SAR, noting the effort that had been undertaken to confirm him in the post of Elementary Teacher. He suggested that it was a "foregone conclusion" that his appointment would be terminated in three months "under cover of confirmation." He stated that the ratings discussed with him in February for his periodic report had been changed "without discussing them". He recalled his willingness to accept "termination through negotiation" pursuant to staff rule 109.1.

In a reply dated 22 March 1993, the Director of UNRWA Affairs, SAR, informed the Applicant, "I am unable to transfer you to the post of Area Welfare Officer or to an equivalent post." He noted that "it would be inappropriate for the Agency to terminate your appointment unless it has a valid reason for doing so". He suggested that termination could be discussed in the context of settlement negotiations of the Applicant's pending appeal.

On 15 April 1993, the Applicant lodged another appeal with the Joint Appeals Board (JAB), against the decision to defer his confirmation in the post. On 20 May 1993, the Field Personnel Officer, SAR, advised the Applicant that, "based on your periodic report which was completed for consideration of confirmation of transfer, your transfer to the post of Teacher is hereby confirmed." With effect from 1 October 1993, the Applicant resigned and separated from service.

On 12 July 1994, the JAB adopted its report. Its evaluation, judgement and recommendation read as follows:

"III. EVALUATION AND JUDGEMENT

(a) The Board noted that the Administration's decision to defer the Appellant's confirmation of transfer to the post of Elementary Teacher, Grade 07, for a period of three months was entirely based on the fact that his performance was not satisfactory.

...

(c) In this context, the Board is of the opinion that Area Education Officer and the Area Officer are in a better position to evaluate the Appellant's performance.

...

(e) As for the Administration's submission that the Appellant's appeal is frivolous due to the fact that the Appellant had pointed out on several occasions that he does not wish to be confirmed in the post, the Board believes that what the Appellant had actually meant was that he wanted to be transferred back to the post of Area Welfare Officer; and, that the decision to defer confirmation of the Appellant's transfer which is the subject matter of this appeal could have led to the termination of the Appellant's services had he not received a second periodic report in June 1993 indicating satisfactory ratings of his performance.

IV. RECOMMENDATION

19. In view of the foregoing, the Board unanimously makes its recommendation that the confirmation of the Appellant in the post of Teacher 'C', Grade 07, should have taken place in March 1993, based on the Appellant's satisfactory performance as evaluated by his immediate and intermediate supervisors in the Period Report of March 1993."

On 19 August 1994, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him, inter alia:

"I note that the Board concluded that your immediate and intermediate supervisors, who rated your performance as satisfactory and above satisfactory in the evaluation report prepared to assess your suitability for confirmation in the teaching position, were in a better position to evaluate your performance than your principal supervisor, who recommended

deferment of confirmation in the appointment. Based on the foregoing, the Board unanimously made its recommendation that confirmation of your appointment should have taken place in March 1993, and by implication, without any period of deferment.

In the interest of bringing this matter to a final conclusion, I am prepared to accept the Board's recommendation. I have therefore issued instructions that your Agency records are to be amended to reflect confirmation of your appointment in the teaching position in March 1993, without any period of deferment."

On 17 September 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant never requested to be transferred from the post of Area Welfare Officer, which was the subject of his first appeal. All transfers since then have been disciplinary measures.

2. The "severe warning", which is the subject of the Applicant's second appeal, paved the way for the unfair deferral of confirmation of transfer.

Whereas the Respondent's principal contentions are:

1. The Applicant's alleged injury has been fully redressed and his claim, therefore, is moot.

2. The Applicant's contention that he should be transferred back to a Welfare Post was not considered by the JAB and is not properly before the Tribunal.

The Tribunal, having deliberated from 3 to 22 November 1995, now pronounces the following judgement:

I. The complaint now brought before the Tribunal by the Applicant is an offshoot of the events dealt with by the Tribunal in

Judgement No. 717, dated 28 July 1995. In that case, the Respondent informed the Applicant, on 10 January 1992, that a fair solution to the difficulties faced by the Applicant resulting from frequent transfers from place to place in 1990/1991 would be to move him from Damascus to Aleppo and to offer an ex gratia payment of 25,000 Syrian pounds. The Applicant was not satisfied by these measures but accepted with thanks his transfer to Aleppo, his home town. He did in fact move there in February 1992. He now complains that the Field Personnel Officer, SAR, sent a letter dated 28 February 1993, in which he stated that it had been "decided to defer confirmation of your transfer for a period of three months". The Applicant contends that this had the effect of depriving him of the opportunity for advancement, and was based on biased periodic reports which he did not have a chance to rebut. The Applicant argues that the action taken by the Respondent was not only in violation of existing Regulations and Rules but was based on malice and was the result of systematic manipulations against him by various persons in UNRWA, SAR. All this time, the Applicant continued to press for reinstatement to his post as Area Welfare Officer or an equivalent post.

II. The Respondent contends that the decision to delay confirmation of the Applicant's transfer to Aleppo was due entirely to his poor performance as a teacher, especially to his failure, on occasion, to prepare lessons for his students and that such a decision is entirely within the competence and discretion of the Respondent.

III. The Tribunal finds - as indeed is clear from several communications received from the Respondent - that the letter of 28 February 1993, from the Field Personnel Officer, marked "Private and Official" should not have referred to "deferral of confirmation of transfer" when the Applicant had in fact been physically

transferred to Aleppo about a year before. What was apparently meant was that his confirmation in the post of Elementary Teacher at Grade 7 should be postponed for three months, pending another report on his work at the expiry of this period.

The Tribunal has not been given any satisfactory explanation for this action by the Respondent except for his reference to a Personnel Directive, effective from 1 February 1993, almost a year after the Applicant had actually been transferred to Aleppo. This apart, the Tribunal is not at all convinced that the Directive, which is mainly concerned with probation, applied to the Applicant. For, in the words of the Officer-in-Charge, Headquarters (Vienna), in his letter of 10 January 1992, the Applicant was to be "transferred back to Aleppo to the temporary post of Elementary Teacher at Grade 7, with priority to be offered the first vacant post that comes up in that area (as an English Teacher, preparatory cycle, at Grade 9)". In the view of the Tribunal, the clear intention of such a decision was to appoint the Applicant in Grade 7 temporarily and to promote him to Grade 9, as soon as a suitable opportunity occurred. There was no indication that he was being to sent to Aleppo on probation, in February 1992.

IV. Furthermore, there is some indication that the decision of the Officer-in-Charge, Headquarters, was at variance with the kind of action contemplated by the Area Administration of UNRWA in Syria. In this connection, the Tribunal recalls the recommendations of the Periodic Review Committee on the Applicant in the process which led to his initial transfer from Aleppo, and which reflected the attitude of the Respondent that unless the Applicant improved his work and attitude significantly he might have to be separated from service.

V. The Applicant resigned from the Agency's service at the end of September 1993. The JAB examined all the documents and

recommended that the Applicant should have been confirmed in his post in March 1993. This recommendation was accepted and was given effect. Nevertheless, the Tribunal finds that, while the background of this case does not justify any conclusion of inherent bias or prejudice against the Applicant, he did nonetheless suffer much avoidable uncertainty and anguish, because of the way he was treated and particularly, the way he was subjected to a confirmation process for a post that was below his grade level and intended to be temporary until a more suitable post became available. For this, he is entitled to some monetary compensation which the Tribunal assesses at US$2,000.

VI. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant a sum of US$2,000.

(b) Rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary